Supreme Court, U.S.
FILED
991291 JAN 27 1999
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No. _____

In The

Supreme Court of the United States

JF HOTEL MANAGEMENT,

Petitioner,

versus

THOMAS FLYNN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), be interpreted to permit a claim alleging disability discrimination to be sent to the jury, or a jury verdict for the plaintiff upheld, where, although there is some evidence to show that the employer's proffered legitimate reason for the discharge is pretextual, there is no evidence, in a *prima facie* case or otherwise, that the true reason for the discharge was disability discrimination?

2. Should a claim alleging disability discrimination be submitted to the jury, or a jury verdict for the plaintiff upheld, where there is no evidence to create a presumption of discrimination on the basis of disability, apart from the subjective impression of the plaintiff formed in a single hand-shake encounter?

CERTIFICATE OF INTERESTED PARTIES

In compliance with this Court's Rules 14(b) and 29.6, Petitioner JF Hotel Management lists the following parties, parent companies and non-wholly owned subsidiaries in addition to the interested parties already listed in the caption of this case:

1. Akerman, Senterfitt & Eidson, P.A.
2. Avel Hotels of Naples, Inc.
3. Peter Burkert, Esq.
4. Burkert & Hart, P.A.
5. Anthony Cuva, Esq.
6. Robert Donald, Esq.
7. Honorable Patricia Fawsett
8. Thomas Flynn
9. Carol Burkett Hawkins, Esq.
10. Humphrey & Knott, P.A.
11. Innkeepers Hospitality, Inc.
12. JF Hotel Management
13. JF Hotels, Inc.
14. Stokes & Murphy, P.C.
15. Arch Stokes, Esq.
16. H. Andrew Swett, Esq.
17. Karl Terrell, Esq.

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court judgment without opinion. The order affirming the judgment is reproduced in the Appendix at "A". The opinion of the United States District Court for the Middle District of Florida denying Petitioner's Motion for Judgment as a Matter of Law following the jury's verdict is reproduced in the Appendix at "B". The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing En Banc is reproduced in the Appendix at "C".

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order affirming the judgment below on October 8, 1999. The Petition for Rehearing En Banc of J. F. Hotel Management was denied on December 15, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 12112(a) provides, in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee

compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

A. Facts

Defendant-Appellant J. F. Hotel Management (hereinafter "JFHM") operated the Hampton Inn in Naples, Florida (hereinafter "the Hotel"). Denis Longchamps, the General Manager of the Hotel, hired the Plaintiff-Appellee, Thomas Flynn, as a maintenance engineer on November 1, 1990. Mr. Flynn was subsequently promoted to the position of Rooms Manager.

Mr. Flynn lost the middle three fingers of his right hand when he was a boy, but there is no dispute that he was able to and did perform his duties competently and well until the last day of his employment by JFHM.[1] There is no issue in this case as to whether Mr. Flynn required or was denied a reasonable accommodation. Instead, this is a discrimination case based solely on Mr. Flynn's characteristic of possessing a physical disability.

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[1] The parties stipulated prior to the trial that "plaintiff has a disability involving amputation to the fingers of his right hand." JFHM at no time conceded that this stipulation waived its right to prove that plaintiff's amputated fingers did not render him impaired in the performance of a major life activity. JFHM then sought, but was denied, permission to withdraw that stipulation prior to trial. That order of the district court was not appealed to this Court. Thus, for purposes of this Petition, it is assumed that Mr. Flynn is a disabled person.

Mr. Flynn's claim of discrimination derives from a single encounter with an executive of JFHM, John Langley. John Langley has been employed by JFHM since 1992, starting out as a hotel General Manager and, at the time he met Mr. Flynn, he held the position of JFHM's Director of Operations, overseeing numerous hotels, including the Hotel in which Mr. Flynn worked. Mr. Langley was appointed to the Director of Operations position in the spring of 1994, shortly before the company became a publicly traded company. In preparation for the pending public scrutiny of the company's hotels, Mr. Langley visited all of the hotels under his supervision in order to help them standardize their operations.

Mr. Langley met Mr. Flynn for the first time in April of 1994, when he visited the Hotel shortly after assuming his new position as Director of Operations. There is no dispute that the two men shook hands at that meeting.

Mr. Flynn testified that when he shook hands with Mr. Langley, Mr. Langley "gave like a re-coil and actually like astonished look." He also testified: "I have had different encounters shaking hands with somebody, and I know when somebody, you know, really [a]ffects them badly and they don't like it, whatever."

The foregoing was literally the *only* "evidence" of anti-disability animus produced by Mr. Flynn during the entire trial. Mr. Langley denied having such a reaction, and it is notable that the hand-shaking incident made absolutely no impression on Mr. Longchamps, who was present at the time. Longchamps, when he testified, could

not even recall whether Mr. Langley indicated awareness of Mr. Flynn's disability.[2]

After the two men shook hands, they, along with Mr. Longchamps, proceeded with the inspection of several rooms of the Hotel. At no time during this forty-five minute inspection did Mr. Langley say anything negative with respect to Mr. Flynn or his work performance, or make any mention of Mr. Flynn's hand.

Mr. Flynn next saw Mr. Langley about two weeks later, in the lobby of the Peabody Hotel in Memphis. Mr. Flynn had received the Hampton Inn's President's Award, and the company had paid for him and his wife to attend the presentation ceremony at that hotel. There were thousands of people from JFHM at the convention in the hotel. Mr. Langley saw Mr. Flynn and his wife in the lobby of the hotel. Mr. Langley did not recognize Mr. Flynn at first, and was unaware that Mr. Flynn was to receive the President's Award. This was the last time Mr. Flynn ever saw Mr Langley prior to this litigation.

On the morning of June 9, 1994, two months after his first meeting and handshake with Mr. Flynn, Mr. Langley called the Hotel to deal with some mistakes that were being made in filling out expense reports. Denis Longchamps was in Tampa for a sales conference, and the

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[2] Mr. Longchamps was not called as a witness in the trial; however, the trial judge permitted Plaintiff's counsel to read most of Mr. Longchamps's deposition into the record. Because JFHM did not have counsel present at Mr. Longchamps's deposition, it never had the opportunity to cross-examine him or to object to the numerous leading questions asked by Mr. Flynn's counsel.

Assistant General Manager, Amy McNichols Longchamps (Denis Longchamps's sister-in-law), had not yet come in when Mr. Langley called. Mr. Flynn was therefore the most senior manager on the property, and Mr. Langley asked to speak to him. Some of the evidence of what happened next is in dispute; however, as shown below, there are also significant *undisputed* facts. According to Leticia Gerbec, who was the front desk clerk on that day and took the call from Mr. Langley, Mr. Langley explained that he wanted to fax a copy of the expense report to Mr. Flynn and have him call back to discuss it. Ms. Gerbec spoke to Mr. Flynn, but he initially refused to comply with Langley's request. She testified that Mr. Langley became upset when informed of Mr. Flynn's reaction. He then asked her again to have Mr. Flynn call him. Shortly thereafter, Mr. Flynn called and spoke to Mr. Langley.

Mr. Flynn admitted that Mr. Langley indeed wished to fax him a copy of an expense report in order to explain the correct manner of filling it out. Mr. Flynn also admitted that he expressed some reluctance to do what was asked of him, believing that this kind of thing was not his job, even though it is undisputed that he was at that moment the highest-ranking manager on the property. Mr. Flynn testified that he paged Denis Longchamps, who allegedly told Mr. Flynn not to worry about the expense report. Mr. Flynn also testified that he told Mr. Longchamps he wasn't feeling well and might go to the doctor about his blood pressure.

Mr. Longchamps, who appeared as a witness for Mr. Flynn, testified that his first involvement in the incident occurred when he received a phone call from his wife

Celeste, the Hotel's breakfast hostess. Celeste informed him that Mr. Flynn was very upset about something and was "ready to walk out of here." Mr. Longchamps testified that the next phone call he received was from Mr. Langley, who was extremely upset that Mr. Flynn had refused to work on the expense report with him. According to Mr. Longchamps, Mr. Langley told Mr. Longchamps to write up Mr. Flynn for insubordination, which Mr. Longchamps said he refused to do until he got back to the Hotel and figured out what was going on. He then told Mr. Langley, either in the same conversation or in another conversation shortly thereafter, that Mr. Flynn was "ready to walk out of the hotel right now if he's not already gone."

Leticia Gerbec testified that Mr. Flynn had indeed quit. She testified that after Mr. Flynn went to call Mr. Langley, following the second request to do so, he emerged in an angry mood, saying it "wasn't fair," saying that he "quit", and walking out the front door. Ms. Gerbec testified that she called both John Langley and Denis Longchamps to inform them of this.

It is undisputed, therefore, that Mr. Langley was informed by both Mr. Longchamps and Ms. Gerbec that Mr. Flynn was "walk[ing] out" and "quit[ting]". This is what Mr. Langley believed, as Mr. Longchamps confirmed when he testified to a *subsequent* conversation with Mr. Langley in which Mr. Langley stated his belief that Mr. Flynn had quit.

Acting on this belief, Mr. Langley called his superior, Fred Shaw, and the two of them agreed that if Mr. Flynn,

who was at that moment the highest-ranking management person on property in the Hotel, had walked off the job, his pager and keys should be collected and he should be allowed to leave. Mr. Langley then called the Hotel and instructed Assistant General Manager Amy McNichols Longchamps, who had since come in to the Hotel, to relieve Mr. Flynn of his pager and keys. These two conversations – with Shaw and with Ms. Longchamps – occurred *after* Mr. Longchamps told Mr.Langley that Mr. Flynn was "ready to walk out of the hotel right now if he's not already gone," and after Ms. Gerbec told him that Mr. Flynn had quit.

Although some facts regarding the events of June 9, 1994 are in dispute, certain key points are undisputed. First, it is undisputed that Mr. Flynn, by his own admission at trial, was reluctant to cooperate in Mr. Langley's attempts to correct mistakes in the Hotel's expense reports, even though he was a manager of the Hotel. Second, it is undisputed that Denis Longchamps and Leticia Gerbec gave John Langley the impression – correctly or not – that Tom Flynn had quit his job, that he had walked off the Hotel property in the middle of his shift when he was the most senior manager on the property at the time. It is also undisputed that Mr. Langley's request to Amy McNichols that she relieve Mr. Flynn of his pager and keys occurred after Mr. Langley's conversations with Mr. Longchamps and with Ms. Gerbec indicating that Mr. Flynn had quit.

Finally, it is undisputed that the subject of Mr. Flynn's disability never arose on that day – or on any other day prior to the commencement of this litigation.

Mr. Flynn did not recall whether he ever told Mr. Longchamps on the day of June 9 that he had not in fact quit. He definitely never told John Langley. Mr. Longchamps did not make any attempt to resolve the situation, believing from Mr. Langley's demeanor over the telephone that nothing could be done. Mr. Flynn never returned to work at the Hotel, although he was offered unconditional reinstatement shortly before the trial.

Mr. Flynn never introduced any evidence that he was replaced in his job by a non-disabled person. Moreover, even Mr. Flynn's counsel acknowledged that JFHM had no history of discrimination against persons with disabilities.

B. Procedural History and Basis of Jurisdiction In The First Instance

The complaint in this case was originally filed on June 22, 1995, alleging disability discrimination in employment in violation of the Americans with Disabilities Act, 42 U.S.C. § 12201, *et seq.*, and the Florida Civil Rights Act, Fla. Stat. ch. 760. The complaint was filed against Avel Hotels, Inc., the former owner of the Hampton Inn in Naples, Florida, and against present Defendant-Appellant J. F. Hotel Management, the management company that runs the hotel.

J. F. Hotel Management moved to dismiss the complaint or for summary judgment on July 31, 1995, which motion was denied on December 8, 1995. J. F. Hotel Management then answered the Complaint on January 29, 1996. Avel Hotels answered the Complaint on August

4, 1995, but a default judgment was ultimately entered against Avel on February 4, 1997.

On December 24, 1996, J. F. Hotel Management moved to permit Regina Alberini Young to withdraw as its attorney. That order was granted on February 18, 1997. Present counsel, Stokes & Murphy, entered an appearance on May 8, 1997. J. F. Hotel Management again moved for summary judgment on December 1, 1997. That motion was denied on April 20, 1998.

The trial of this case occurred on June 2-4, 1998, before Judge Patricia C. Fawsett. J. F. Hotel Management moved for directed verdict at the close of the plaintiff's case and at the close of all the evidence. Plaintiff also moved for directed verdict at the close of all the evidence. All directed verdict motions were denied, and the case was submitted to the jury. The jury returned a verdict in favor of the plaintiff on June 4, 1998. Judgment was entered on the verdict on June 8, 1998.

J. F. Hotel Management moved for judgment as a matter of law or for new trial on June 22, 1998. On August 27, 1998, Judge Fawsett denied this motion. A Notice of Appeal was filed by J. F. Hotel Management on September 8, 1998, and then amended on September 15, 1998.

The Court of Appeals for the Eleventh Circuit affirmed the judgment without opinion on October 7, 1999. J. F. Hotel Management petitioned for a Rehearing En Banc on October 28, 1999.

On November 24, 1999, after certiorari was granted by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 444 (Nov. 8, 1999), counsel for

J. F. Management sent a letter to the Court of Appeals noting this Court's grant of certiorari in that case and urging the Court of Appeals to await the decision of this Court before rendering a decision on the Petition for Rehearing En Banc. Nevertheless, on December 15, 1999, the Court of Appeals denied the Petition for Rehearing En Banc.

REASONS FOR GRANTING THIS PETITION

The ruling of the Eleventh Circuit in this case conflicts directly with the opinion issued by the Fifth Circuit in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 98-60334, slip op. (5th Cir. Apr. 22, 1999) (per curiam), *cert. granted*, ___ U.S. ___, 120 S.Ct. 444 (Nov. 8, 1999), in which this Court has already granted a writ of certiorari. The different outcomes of *Reeves* (granting a Motion for Judgment as a Matter of Law despite a jury verdict for the plaintiff) and the present case (denying a Motion for Judgment as a Matter of Law in the face of a jury verdict for the plaintiff) reflect the split among the Circuits in their interpretation of this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Petitioner J. F. Hotel Management respectfully requests this Court to grant a writ of certiorari in the present case also so that it may decide this case either on its own or as a companion case with *Reeves*, utilizing both cases to clarify its opinion in *Hicks* and the quantum of proof necessary to prove a discrimination case. Petitioner submits that the case *sub judice* will be helpful to this Court in deciding this issue given the differentiation in

the facts – specifically, that the quantum of evidence of discriminatory animus in the case *sub judice* is much lower than in *Reeves*.

In the alternative, Petitioner requests that this Court hold this case and defer its ruling on this petition until this Court delivers its judgment in *Reeves* and then refer this case back to the Eleventh Circuit with instructions to review it in light of this Court's ruling in *Reeves*.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING HOW MUCH EVIDENCE A PLAINTIFF MUST SUBMIT IN ORDER TO PROVE THAT HIS DISCHARGE RESULTED FROM DISCRIMINATION AND NOT FROM SOME OTHER FACTOR.

As described in Reeves's Petition for Writ of Certiorari at 4-7, a split has developed among the Circuits regarding how to interpret this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The Eleventh Circuit Court of Appeals and others have hewed to this Court's language in *Hicks* that, once a prima facie case is established, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . '[n]o additional proof of discrimination is *required*.' " 509 U.S. at 511 (emphasis in original, citation omitted). *See, e.g., Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998). These Courts therefore always refuse summary judgment and judgment as a matter of law if a plaintiff can provide a prima facie case and introduce some evidence casting doubt upon the

employer's proffered reasons for the disputed employment action.

The Fifth Circuit Court of Appeals, whose opinion in *Reeves* this Court has agreed to review, has held, by contrast, that a prima facie case alone, even coupled with evidence that the employer's proffered legitimate reason for the disputed employment action is pretextual, may not always be sufficient to avoid judgment as a matter of law. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc). The Court of Appeals in *Rhodes* concluded that "if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent." 75 F.3d at 994. *See also Hicks*, 509 U.S. at 515 (emphasis in original): "[A] reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason;" and at 514-515: "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." Other Circuits interpret *Hicks* in accord with the Fifth Circuit. *See, e.g., Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995).

Consistently with this approach, the Fifth Circuit Court of Appeals held in *Reeves*: "[W]hether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether

Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *Reeves, supra,* slip op. at 9. Concluding that he did not, the Court reversed the judgment in his favor.

In the present case, by contrast, the Eleventh Circuit Court of Appeals let stand a jury verdict in favor of the plaintiff based entirely on evidence of pretext (the impeachment, to some degree, of J. F.'s witnesses) plus Flynn's own subjective impression that, some months prior to Flynn's discharge, John Langley had "recoiled" upon shaking Flynn's deformed hand. Had the Fifth Circuit Court of Appeals decided this case, there can be little doubt that the judgment would have been reversed. Despite whatever impeachment occurred of J. F.'s witnesses at the trial of this case, the fact remains that there was no evidence that Flynn's "[disability] motivated [J. F.'s] employment decision." *Cf. Reeves, supra,* slip op. at 9.

Petitioner J. F. Hotels submits that the Eleventh Circuit, and numerous other Courts, have misinterpreted this Court's opinion in *Hicks* by parsing too closely the language that a prima facie case plus rejection of the defendant's proffered reasons "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination", 509 U.S. at 511, and ignored this Court's admonition in the same opinion that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." 509 U.S. at 515.

II. THE PRESENT CASE ALSO PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY WHAT EVIDENCE IS NECESSARY TO SUPPORT A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION, AND WHETHER THE PLAINTIFF'S SUBJECTIVE IMPRESSION IS SUFFICIENT TO SUPPORT EITHER A PRIMA FACIE CASE OR A JURY VERDICT OF DISABILITY DISCRIMINATION.

As discussed above at 4-5, the sole evidence presented by Flynn to link his disability to his discharge was his own subjective impression at his first meeting with John Langley that Langley "gave like a re-coil and actually like astonished look," and his statement: "I have had different encounters shaking hands with somebody, and I know when somebody, you know, really [a]ffects them badly and they don't like it, whatever." Flynn was discharged a few months later under circumstances which are confused, but the undisputed facts support J. F.'s position that Langley believed Flynn had walked off the job. It is in any event undisputed that the subject of Flynn's disability was never raised by Langley (or anyone else at J. F. Hotels) at any time to anyone prior to Flynn's discharge. Flynn never even presented evidence as to whether or not he was replaced by a non-disabled individual.

At the trial of this case, counsel for J. F. Hotels moved for a directed verdict following the presentation of the plaintiff's case-in-chief, asserting that Flynn had failed even to make out a prima facie case of disability discrimination. The trial judge denied the motion, requiring J. F.

Hotels to put on its defense. Petitioner J. F. Hotels submits that the trial judge erred, because Flynn's evidence was insufficient even to raise a rebuttable inference that his disability played a role in his discharge.

As this Court has held, the purpose of the prima facie case in a discrimination action is to raise a rebuttable presumption that unlawful discrimination played a role in the disputed employment decision. "Establishment of a *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The presumption of discrimination must be strong enough so that, if the presumption is not rebutted by the employer's evidence that lawful reasons underlay the decision, judgment for the plaintiff would be proper. "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* *See also Hicks, supra*, 509 U.S. at 506 (citation omitted) (" '[A] presumption' . . . is 'a required conclusion in the absence of explanation.' ")

If the judgment in the present case is permitted to stand, it will establish that a plaintiff's subjective belief that his employer had a negative reaction to his disability is alone sufficient to raise the presumption that his disability caused his discharge. Petitioner submits that this extreme holding should not be allowed to stand, and requests that this Court offer some guidance to courts and litigants regarding the minimum standard of proof necessary to raise a presumption of discrimination.

CONCLUSION

By granting certiorari in *Reeves*, this Court has already acknowledged the importance of resolving the split in the Circuits regarding *Hicks*. The present case is a companion to *Reeves*, demonstrating how the differing interpretations of *Hicks* yield different results in similar cases. This Court must establish clearer standards defining the minimum evidence necessary for a discrimination plaintiff to avoid judgment as a matter of law. This case presents the additional issue, moreover, of what minimum evidence is necessary for a discrimination plaintiff to supply a prima facie case. In the present case, the subjective impression of the plaintiff was alone held sufficient. Given the large number of discrimination cases in federal courts – and the increasing number of disability cases among those – it is crucial that this Court offer some guidance to district courts on this issue as well.

Petitioner J. F. Hotels therefore respectfully requests that this Court grant certiorari in the present case, or, in the alternative, hold this case until this Court renders its decision in *Reeves*.

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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J. F. Hotel Management

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3271

D. C. Docket No. 95-00208-CV-FTM-26D

THOMAS FLYNN,

Plaintiff-Appellee,

versus

AVEL HOTELS OF NAPLES, INC., a Florida corporation,

Defendant,

JF HOTEL MANAGEMENT, a Florida corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(October 7, 1999)

Before CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge.

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*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

THOMAS FLYNN,

Plaintiff,

v. CASE NO.95-208-CIV-FTM-21D

JF HOTEL MANAGEMENT,
a Florida corporation,

Defendant.

_____/

ORDER

This cause came before the Court on the following matters:

1) Plaintiff's Motion for Attorneys' Fees & Litigation Expenses (Doc. No. 128, filed June 22, 1998), Plaintiff's Memorandum in Support of Motion for Attorneys' Fees & Litigation Expenses (Doc. No. 129, filed June 22, 1998), and the Opposition of J.F. Hotel Management to Plaintiff's Motion for Attorneys' Fees and Litigation Expenses (Doc. No. 139, filed July 10, 1998) are hereby **REFERRED** to the United States Magistrate Judge for Report and Recommendation.

2) Plaintiff's Motion to Amend Judgment and Memorandum of Law in Support of the Motion (Doc. No. 130, filed June 22, 1998) is **GRANTED.**

3) Motion of Defendant, JF Hotel Management for Judgment as a Matter of Law or, in the Alternative, for New

Trial and Memorandum of Law in Support (Doc. No. 131, filed June 22, 1998),[1] and Plaintiff's Memorandum in Opposition to JF Hotel's Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial (Doc. No. 138, filed July 9, 1998).

Defendant JF Hotel Management has moved for judgment as a matter of law or, in the alternative, for a new trial based upon five grounds: 1) there was no competent evidence that any discriminatory motive played a role in the events leading to the termination of Plaintiff; 2) Plaintiff should not have been permitted to read the deposition of Dennis Longchamps into the record; 3) Defendant should have been permitted to withdraw its stipulation that Plaintiff was disabled; 4) the jury improperly awarded Plaintiff front pay; and 5) the jury improperly awarded punitive damages.

Federal Rule of Civil Procedure 50 (a) requires that a motion for judgment as a matter of law made during trial specify the grounds for granting the motion. Litigants may not base a post-trial Rule 50(b) motion for judgment as a matter of law on a ground that was not included in a prior motion for judgment as a matter of law. *See e.g., Redd v. City of Phenix City, Ala.*, 934 F.2d 1211, 1214 (11th Cir. 1991); *Williams v. Runyon*, 130 F.3d 568, 571-72 (3d Cir. 1997); *McCann v. Texas City Refining, Inc.*, 984 F. 2d 667, 672 (5th Cir. 1993); *U.S. Industries Inc. v Blake Constr. Co., Inc.*, 671 F.2d 539, 548 (D.C. Cir. 1982); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995).

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[1] Defendant has filed this motion and memorandum in duplicate. *See* Doc. Nos. 136 & 137, filed June 24, 1998).

At the close of Plaintiff's case, Defendant moved for judgment as a matter of law based upon Plaintiff's inability to establish a prima facie case through his failure to produce evidence showing that his "termination was based on disability." (Transcript, Doc. No. 138 at app. 12). At the close of all of the evidence, Defendant renewed its motion for judgment as a matter of law by stating the following:

> Defendant renews their motion for directed verdict . . . Plaintiff has failed to establish . . . sufficient evidence to meet the prong of the prim[a] facie case, that the separation from employment was based on disability discrimination because of disability discrimination.

(Transcript, Doc. No. 138 at app. 38). Neither at the close of Plaintiff's case, nor at the close of all the evidence, did Defendant make a motion for judgment as a matter of law with regard to Plaintiff's inability to show pretext or with regard to grounds two through five above which Defendant attempts to assert in this post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. Thus, Defendant has waived ground one of its current motion, to the extent that ground one asserts insufficient evidence of pretext, and has also waived grounds two through five as bases for post trial judgment as a matter of law. Nevertheless, because Defendant may move for a new trial under Federal Rule of Civil Procedure 59 based on evidentiary grounds without previously having raised specific objections to the Court, the Court will consider the merits of Defendant's evidentiary arguments for a new trial. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656 (8th Cir. 1995).

Defendant has wholly failed to show that it is entitled to judgment as a matter of law on Plaintiff's establishment of a prima facie case or that it is entitled to a new trial based on any of the grounds asserted, whether evidentiary or not. Only Defendant's arguments relating to sufficiency of the evidence and punitive damages merit discussion.

Plaintiff clearly presented evidence meeting the elements of a prima facie case of disability discrimination. This case presented conflicts in the evidence which the jury resolved in accordance with the law. The body language, the tone of the witnesses' testimony, and the manner in which the testimony was given support the verdict of this jury in addition to the specific words used. Persons who discriminate on the basis of disability seldom are forthright about, or acknowledge, their actions. This is one reason the laws against impermissible discrimination in the workplace are important. This case represents a factual situation which the ADA was designed to redress.

Whether the evidence is sufficient to support an award of punitive damages is a question of law. *See, e.g., Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1384 (10th Cir. 1989). Defendant made no objection at trial to submission of the issue of punitive damages to the jury. Post-trial, Defendant contends that the evidence was insufficient to justify an award of punitive damages against Defendant corporation based upon the acts of one "rogue" employee. The Court does not agree.

Punitive damages are available where the Plaintiff demonstrates that the employer "engaged in . . . discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a. Constructive knowledge of discrimination on the part of the employer is not enough to justify an award of punitive damages. *See Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996). However, an award of punitive damages against the employer may be appropriate where the employee is a member of higher management or the employee's acts were authorized or approved, implicitly or explicitly, by the employer. *See id.* at 491-92.

In this case, John Langley was not just a low-level, "rogue" employee whose actions had no bearing on the state of mind of his corporate employer. Langley was a member of higher management in Defendant corporation such that his actions and state of mind could be equated with that of Defendant corporation. Langley was Director of Operations of Defendant corporation with 3,500 employees under his management, he answered directly to the company's president, his office was at corporate headquarters, he was secretary of the corporation, and he actually wrote the mission statement for the corporation. (Transcript, Doc. No. 138 at app. 4, 27, 28, 30, 31, & 36; Plaintiff's Exh. D at app. 53) . In fact, Langley was the corporate representative at trial. Langley's position in the corporate hierarchy was such that his discriminatory actions could be viewed as being those of the corporation or as being implicitly authorized or approved by Defendant corporation. Furthermore, it appeared that not only

was there discrimination on the basis of Plaintiff's disability but also that such discrimination was knowing and willful at the time it occurred based on the events that transpired and the Defendant's version of those events, which the jury did not believe.

The jury's verdict was appropriate. The motion of Defendant, JF Hotel Management, for Judgment as a Matter of Law or, in the Alternative, for New Trial is **DENIED.** Defendant's duplicate motion (Doc. No. 136) is **MOOT.**

DONE AND ORDERED at Orlando, Florida this, 26th day of August, 1998.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3271-BB

THOMAS FLYNN,

Plaintiff-Appellee,

versus

JF HOTEL MANAGEMENT, a Florida corporation,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Dec. 14, 1999)

Before: CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAR 2 - 2000
CLERK

(2)

No. 99-1291

In The

Supreme Court of the United States

JF HOTEL MANAGEMENT, INC.,

Petitioner,

v.

THOMAS FLYNN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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STATEMENT OF THE CASE

This Brief in Opposition is submitted on behalf of the Respondent, Thomas Flynn. Mr. Flynn was the Appellee in the Eleventh Circuit and the Plaintiff in the District Court, and he will be addressed herein by surname or as "the Plaintiff." The Petition for Certiorari has been brought by JF Hotel Management, Inc., one of the Appellees in the Eleventh Circuit and one of the Defendants before the District Court. The Petitioner will be addressed herein as "JFH". JFH has included several relevant documents in its Appendix, and rather than duplicating these documents in another appendix, the Plaintiff will simply refer to JFH's Appendix as "JFH/APP" followed by the pertinent page number.

A. Course of Proceedings

The facts of this case were established early during discovery, and JFH has been making the same arguments that it makes to this Court almost from the beginning of this case. JFH's Motion for Summary Judgment in the District Court argued that Mr. Flynn could not make a prima facie case or show that JFH's reasons were pretextual. The District Court denied the Motion, finding that the Court was of the "firm opinion" that the case should be submitted to a jury. At trial JFH moved for a directed verdict on this same basis, and again its evidentiary arguments were rejected. JFH renewed its evidentiary argument at the conclusion of all the evidence, and again it was denied.

The District Court instructed the jury on the *McDonnell-Douglas* burden-shifting test without any objection from JFH, nor did JFH object to the verdict form. The jury's verdict found that the Plaintiff's disability "was a motivating factor in the decision of Defendant to terminate his employment," and awarded him compensatory damages of $65,000 and punitive damages of $150,000. So the jury rejected JFH's evidentiary arguments also.

JFH submitted a Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial. JFH raised five issues, one of which was that the jury's verdict was not supported by the evidence. The District Court found in its Order that JFH had not preserved the first four issues at trial. (JFH/APP 5) As to the sufficiency of the evidence, the District Court held that JFH had preserved the issue as to the Plaintiff's prima facie case, but had not preserved the issue of pretext. (*Id.*) The District Court nevertheless considered all of JFH's arguments concerning the sufficiency of the evidence, since a new trial can be granted even without proper preservation at trial. (*Id.*) The District Court then rejected all five of JFH's arguments, finding that the verdict was supported by the evidence and that the compensatory and punitive damages were justified. (JFH/APP 6)

JFH never questioned the burden-shifting method in the District Court, did not object to the jury instructions, did not object to the verdict form, and did not argue, as it seems to before this Court, that there is some confusion about the *St. Mary's* case. The District Court instructed the jury that it must find that the Plaintiff's firing "was based upon his disability," and the verdict form required

the jury to find that the Plaintiff's disability was a "motivating factor" in his discharge. So the District Court applied the very law that JFH now touts as being the "Fifth Circuit" view that is favorable to its position.

JFH appealed the verdict and Judgment to the Eleventh Circuit. It questioned the sufficiency of the evidence to support the verdict, and also argued that the District Court had erred in finding that it had not properly preserved its evidentiary arguments. On 7 October 1999 the Eleventh Circuit entered its per curiam affirmance without opinion under Eleventh Circuit Rule 36-1. (JFH/APP 1-2) This Rule permits the Court to issue a PCA when "the evidence in support of a jury verdict is sufficient," or where no error of law has occurred and a written opinion "would have no precedential value." JFH filed an extensive Petition for Rehearing en Banc. The Petition was denied, since no Judge of the Eleventh Circuit voted in favor of such relief. (JFH/APP 9)

B. The Facts

Mr. Flynn was born and raised in Chicago, and when he was 11 years old his right hand was crushed. He lost the middle three fingers on his right hand, giving the hand a pincer-like appearance due to the opposition of his little finger and thumb.

In Chicago Mr. Flynn worked in the maintenance and engineering fields. He had two long-term jobs: one with a hotel company and another with the State of Illinois. Mr. Flynn and his wife came to Florida in the late 1980's to be near relatives, and he quickly obtained a job at the new

Hampton Inn that was just opening in Naples. The Hampton Inn was operated by JFH, and Mr. Flynn had been hired by Denis Longchamps, the manager of the hotel and a JFH employee. Mr. Flynn would work at the hotel for Mr. Longchamps for the next four years until he was fired on 9 June 1994.

Mr. Longchamps testified that Mr. Flynn was a substantial reason for the success of the hotel. He said the Plaintiff "did more with that [disabled] hand than I could do with two good hands." He recommended the Plaintiff for various awards, and gave him periodic raises. The Plaintiff even won a national award from Hampton Inns known as "the President's Award." This is the highest honor given by Hampton Inns, and Mr. Flynn was the only employee of the hotel ever to win the award.[1] So the undisputed evidence shows that Mr. Flynn was an exemplary employee for his entire tenure with JFH. But in 1994 Mr. Langley would come on the scene, and that's when the events occurred in rapid succession that ended with the Plaintiff's dismissal.

1. The first meeting in Naples

Mr. Langley became the regional manager for JFH in early 1994. In this capacity he oversaw three or four hotels, one of which was the Naples Hampton Inn. JFH states on page 3 of its Petition that Mr. Langley was the

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[1] Mr. Flynn received a cash payment and a trip to the awards ceremony from Hampton Inns. JFH implies on page 4 of its Petition that it paid these sums to the Plaintiff, but the evidence shows that Hampton Inns paid this money.

"Director of Operations" for JFH at this time, but this is incorrect. Mr. Langley would later ascend up the JFH hierarchy, but at the time of this encounter Mr. Langley was only a regional manager with several hotels under his control.

Mr. Langley first came to the Naples hotel at the end of April of 1994 to "get acquainted." He had a meeting with Mr. Longchamps, where all of the employees (including Mr. Flynn) were discussed.[2] Mr. Langley then met the employees, and the accounts of the meeting between Mr. Langley and the Plaintiff are conflicting. Both could not be correct. As JFH's own counsel advised the jury during his opening statement, the jury would have to make a credibility determination.

The Plaintiff said that when he approached Mr. Langley upon first meeting him the following occurred:

> Well, I shook hands with him, and he jumped back from me and – not actually jumped back, but gave like a recoil and actually like astonished look. I have had different encounters shaking hands with somebody, you know, really affects them badly and they don't like it.

He said the look Mr. Langley gave him, as well as the recoil, told him that Mr. Langley was affected by his

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[2] JFH states that Mr. Langley had not said anything to Mr. Longchamps at this meeting concerning the Plaintiff's disability, thereby indicating that this was of no concern to him. However, this meeting occurred **before** Mr. Langley actually met the Plaintiff, and therefore before he knew about the Plaintiff's disability.

disability as others had been in the past. After the handshake the Plaintiff followed Mr. Langley around as he and Mr. Longchamps looked at various rooms. Mr. Langley said nothing more to the Plaintiff at all, even though the inspection of the rooms was within the sphere of Mr. Flynn's responsibility. There was no farewell handshake at the conclusion of this meeting.

Mr. Langley gave a different version of this first meeting. He testified that when he met the Plaintiff he shook hands with him and did not recoil in any way. He said his inspection showed that the hotel was in good shape. He had a specific recollection of the things he checked in the hotel, and he recalled making small talk with the Plaintiff during the inspection. This version of the first meeting given by Mr. Langley at trial was in conflict with his deposition testimony. He had been deposed two years before trial, and at that time (only two years after the incident) he said he didn't recall any of the details of the meeting with Mr. Flynn. When asked why his memory seemed so much better at trial than it had been two years before, Mr. Langley responded that it was because he had been thinking about it more, that "the plain truth is I forgot maybe at that time [of his deposition]."

2. The Second Meeting in Memphis

The second and last time that the Plaintiff and Mr. Langley would personally meet was in Memphis several weeks after their first encounter. Mr. Flynn was in Memphis to receive his President's Award at the Hampton Inns annual convention. The Plaintiff encountered Mr.

Langley at the convention, and again their recollections of the incident differ markedly.

The Plaintiff said he ran into Mr. Langley in the lobby of the Peabody Hotel. He said hello to Mr. Langley, but Mr. Langley feigned unfamiliarity with him. The Plaintiff explained who he was, and Mr. Langley said "I don't know what you're doing here." The Plaintiff explained that he was there to receive the President's Award, to which Mr. Langley said "I didn't know you won that," and left. Mr. Langley was not at the presentation ceremony, though he was the Plaintiff's superior.

It will be recalled that the Plaintiff was the only person ever to win the President's Award from the Naples Hampton Inn, which was one of only three hotels under Mr. Langley's control. When the Plaintiff won the award he was personally called and congratulated by the President of Hampton Inns, and an article appeared in the Hampton Inns magazine.

Mr. Langley gave a much different version of the Memphis encounter. He testified that he did not know that the Plaintiff was going to be at the convention. When he ran into the Plaintiff in the hotel lobby, he said "I was happy, I was excited, I was proud." He said he remembered shaking the Plaintiff's hand and having a conversation with the Plaintiff's wife. They talked for awhile, and they then parted company amicably. Once again, Mr. Langley had given a drastically different story when he was deposed two years before. He said at his deposition he didn't remember anything about the meeting in Memphis, and couldn't explain why his memory was so much better two years later at trial.

3. The Plaintiff's Dismissal on 9 June 1994

All agree that Mr. Flynn left the employ of JFH on 9 June 1994, shortly after the last meeting in Memphis. On that Thursday morning Mr. Flynn arrived at the hotel early as he usually did. Mr. Longchamps (the manager) had been gone several days to a "sales blitz" in Tampa.

Mr. Flynn was at his station in the laundry area when he received a buzz from the front desk. He went up to the front desk and was told by the clerk that Mr. Langley was on the phone for him. He then went into the office behind the front desk and picked up the phone. Mr. Langley said that he had received an expense report that was done all wrong, and he wanted to fax a copy to the Plaintiff and teach him how to do it correctly. The Plaintiff did not do expense reports (Mr. Longchamps did), and he asked Mr. Langley if he wouldn't prefer to wait until Mr. Longchamps was back at the hotel. Mr. Langley replied that he did not prefer to wait. So the Plaintiff said he would call back as soon as he got the fax. During the telephone conversation Mr. Langley was "rude, loud and very – treated me very badly." The Plaintiff said that Mr. Langley "wasn't talking to me, he was talking at me." This telephone conversation made the Plaintiff anxious and upset.

When the Plaintiff got off the phone he paged Mr. Longchamps in Tampa. Mr. Longchamps called back almost immediately. Mr. Longchamps told the Plaintiff not to worry about the expense report, that it wasn't his job, and that he (Mr. Longchamps) would straighten things out with Mr. Langley. The Plaintiff told Mr. Longchamps that he didn't feel well, "that I felt like my blood

pressure was getting high or something – if I don't feel any better I may have to go to the doctor." Mr. Longchamps told him not to worry and to just go back to work. That's exactly what the Plaintiff did, and he never left the hotel until he was summoned by the assistant manager several hours later.

At around noon Mr. Flynn was beeped again by the front desk, and told that Amy McNichols, the assistant manager, wanted to see him. He went to her office, and she told him to turn in his beeper and keys because "John Langley said you quit and [you should] get off the property." The Plaintiff remonstrated that he had not quit, but Ms. McNichols said she had no choice but to follow Mr. Langley's instructions to usher him from the property.

While the Plaintiff was talking with Ms. McNichols, Mr. Longchamps called. The Plaintiff told him that he had not quit. Mr. Longchamps said that he was sorry, but "John Langley wants you out of here, he said you can't come back, he does not want you here." This was the only job the Plaintiff was ever fired from in his entire life.

Mr. Longchamps was a major character in the events of June 9, even though he was not personally present at the hotel until after the Plaintiff had been fired.[3] Mr.

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[3] JFH grouses about the use of Mr. Longchamps' deposition at trial on page 4 of its Petition. Yet at trial JFH conceded that it had counsel at the time of the deposition, and counsel had been given proper notice of the deposition. For reasons known only to JFH, its counsel did not appear at the deposition nor seek to re-depose Mr. Longchamps. Mr. Longchamps was in New England at the time of trial. In any event, the use of the deposition was not argued as error by JFH in the 11th Circuit.

Longchamps had been in Tampa the whole week. Mr. Langley knew that he was in Tampa. There was actually another executive from JFH with him at the meeting.

Mr. Longchamps first learned that something was wrong at the hotel from his wife, who also worked at the hotel and was there that day. As soon as Mr. Longchamps finished talking with his wife his beeper went off again, and it was Mr. Langley. Mr. Langley "just blew a gasket." He stated in a very heated fashion that he had called the hotel and Mr. Flynn had been unwilling to comply with his request. In this discussion Mr. Langley "seemed to have very little regard for Tom." Mr. Longchamps said he couldn't "get two words in edgewise."

Mr. Longchamps had a second conversation with Mr. Langley shortly after the first one. Mr. Langley told him that he wanted Mr. Longchamps to "write him [Mr. Flynn] up for insubordination." Mr. Longchamps told Mr. Langley that he understood the Plaintiff had been so upset by the call that he had left the hotel "to go see a doctor or went to the hospital because of his blood pressure." When Mr. Longchamps told Mr. Langley this, it "was like a breath of fresh air to John [Langley] . . . I really think that was something John was looking for." Mr. Langley said, "If he comes back, you tell him to leave his pager with you, he's finished, he's through." He "made it very, very clear Tom was not going to come back. Period."

Mr. Longchamps said that Mr. Langley called Amy McNichols as soon as he got off the phone with him and told her to get the Plaintiff's pager and keys because "we weren't going to need his services any longer."

Mr. Longchamps said that the Plaintiff was terminated by JFH, and had not quit. He believed that Mr. Langley used the speculation about the Plaintiff leaving the hotel for medical purposes as an excuse to fire him. He said that Mr. Langley was out of line, and the Plaintiff had not been treated fairly in his termination. Mr. Longchamps summarized his opinion as follows:

> I believe that the company terminated him. That's the way the company wanted it. That's the way the company made it clear to me, I believe they made it clear to Amy [McNichols], and as far as Tom's termination, that was not voluntary at all.

So the manager of the hotel, who was the Plaintiff's direct superior and an employee of JFH, said that Mr. Flynn had been fired and had not quit.

Leticia Gerbec was one of the two witnesses presented by JFH. She presently holds the job that the Plaintiff had when he worked at the hotel. On 9 June 1994 she had not yet been promoted, and she was the front-desk clerk on duty when Mr. Langley called. Mr. Langley told her he wanted to speak with the Plaintiff, and Ms. Gerbec told him she would have Mr. Flynn return the call. She said she then buzzed Mr. Flynn and told him that Mr. Langley wanted to speak with him, but he (Mr. Flynn) refused to return the call. Ms. Gerbec said she then called Mr. Langley and told him that the Plaintiff had declined to call him back and that "he doesn't have time." He told her to have Amy McNichols call him when she came in later, but that he still wanted the Plaintiff to call him back. When the Plaintiff later came to the front desk, Ms. Gerbec said she told him again that he was to call Mr.

Langley. He again refused, and a few minutes later, according to Ms. Gerbec, he walked by her saying that he quit. Ms. Gerbec said that Mr. Langley called back a short while later, and she told him that the Plaintiff had quit. So Ms. Gerbec testified that the Plaintiff never actually talked with Mr. Langley, but quit in a huff. This is contrary to every other witness that testified about the events of June 9 – the Plaintiff, Mr. Longchamps, and even Mr. Langley himself.

There were some other discrepancies in Ms. Gerbec's testimony. Ms. Gerbec had executed an affidavit in support of JFH's Motion for Summary Judgment, and the affidavit said nothing about the Plaintiff quitting; yet this was a critical part of JFH's argument for summary judgment.

JFH's second and last witness, Mr. Langley, gave a version of the events of June 9 that was different from that of Mr. Flynn, Mr. Longchamps, and even Ms. Gerbec. He said he called the hotel that day because "an expense report was repeatedly being filled out incorrectly." He said he had forgotten that Mr. Longchamps was in Tampa. He told the desk clerk (Ms. Gerbec) that he would fax an expense report down, and he wanted Mr. Flynn to call him after the report arrived. Mr. Langley said he talked with Mr. Flynn a short time later. Mr. Langley said that he and Mr. Flynn had a nice conversation, "no hostilities," that it was "cordial and pleasant." He said that he had not been rude to Mr. Flynn, and Mr. Flynn had not acted improperly with him. Mr. Langley said that several hours later he received a call from Mr. Longchamps. Mr. Longchamps reportedly told him, "Tom flew off the

handle, was angry, he quit, walked off the job." Mr. Langley said he was dumbfounded.[4]

4. The Events after 9 June 1994

About two weeks after the firing Mr. Flynn applied for unemployment. JFH resisted his application on the basis that "the claimant [Mr. Flynn] was discharged for alleged insubordination."[5] So two weeks after the Plaintiff's dismissal JFH officially stated, contrary to Mr. Langley's testimony at trial, that the Plaintiff had been fired for insubordination. The Plaintiff did receive unemployment compensation. The Department of Labor found that JFH did not substantiate its claim of insubordination, and that "the discharge was for reason other than misconduct connected with work."

In October of 1994, about four months after the Plaintiff's dismissal, JFH stated in its answer to the Plaintiff's EEOC complaint that the Plaintiff "had walked off the job after non-compliance to a direct order from the Vice President of Operations, John Langley." So by the time of

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[4] JFH states on page 7 of its Petition that it's "undisputed" that Mr. Langley was told by Mr. Longchamps and Ms. Gerbec that Mr. Flynn had quit. This is just plain incorrect. Mr. Longchamps never testified that he told Mr. Langley any such thing. Ms. Gerbec did say this at trial, but had not in her affidavit before trial. It is also clear that Mr. Flynn had told both the assistant manager and the manager of the hotel (both JFH employees) that he had not quit, but both had responded that Mr. Langley still wanted him gone immediately.

[5] Mr. Longchamps had submitted this response on behalf of JFH with explicit instructions from Mr. Langley, which Mr. Longchamps did not agree with.

the EEOC filing JFH's position was beginning to evolve toward its position manifested at trial, but there were still critical differences. Mr. Langley denied at trial that Mr. Flynn had been insubordinate or impolite to him in any way, while in the EEOC filing JFH said that the Plaintiff had disobeyed a direct order from Mr. Langley.

5. Summation of the Facts

To summarize the facts considered by the jury, it is undisputed that Mr. Flynn was an exemplary employee that was instrumental in the success of the hotel. He had never been fired from a job in his life, and he had put in four good years with JFH. Mr. Langley then became his superior, and Mr. Flynn was fired a short time later. The jury was entitled to believe that Mr. Langley expressed revulsion at the Plaintiff's disability when they met for the first time, and was cursory in his treatment of Mr. Flynn during the remainder of this first meeting. The jury could believe that Mr. Langley pretended not to know the Plaintiff when they met in Memphis two weeks later, where Mr. Flynn had gone to receive Hampton Inns' highest award, and that Mr. Langley did not attend the awards ceremony because he was embarrassed by Mr. Flynn. The jury was entitled to believe that Mr. Langley called the hotel on June 9 knowing that Mr. Longchamps would not be there, and manufactured an issue upon which to dispute with Mr. Flynn. The jury could believe that Mr. Langley fired the Plaintiff, and then fabricated the story that the Plaintiff had somehow "quit".

The jury could believe that JFH stated in the official records for unemployment that the Plaintiff had been

fired for insubordination, but then tried to change its story as time went by. The jury could observe that JFH's only two witnesses at trial gave testimony that was internally and externally inconsistent. The jury could also observe that both Mr. Langley and Ms. Gerbec had changed their testimony since the discovery phase of the case, "remembering" facts that were favorable to JFH's position and that were contradicted by the evidence presented by the Plaintiff. Finally, the jury could observe that JFH's own employees, *i.e.*, Mr. Longchamps and Ms. McNichols, gave testimony consistent with the Plaintiff's evidence and inconsistent with Mr. Langley's and Ms. Gerbec's testimony.

The bottom line is that a great employee has been fired by a supervisor shortly after the supervisor expressed revulsion at his disability, with no plausible explanation for why this occurred. To the contrary, the case is replete with markers of fabrication and pretext by JFH, and certainly the jury was justified in believing that the real motivation for Mr. Flynn's firing was his disability. Both the District Court and the Eleventh Circuit so concluded, and it is respectfully submitted that there is no reason for this Court to further review this case.

ARGUMENT AGAINST CERTIORARI

JFH's framing of the questions presented for review shows, it is respectfully submitted, how inappropriate certiorari review would be in the instant case. Rule 14 states that the questions presented "should be short and should not be argumentative or repetitive." JFH has

stated two long, involved questions that presuppose a factual scenario that is not supported by the evidence of this case. JFH states in the first question that even though there "is some evidence" that Mr. Flynn's firing was pretextual, there is no evidence that the "true reason" for the firing was discrimination based on Mr. Flynn's handicap. "True reasons" are probably beyond determination by mere mortals. And there is no case from this Court or any circuit court intimating that a plaintiff must produce undisputed proof of the "true reasons" for his discharge. In the final analysis JFH disagrees with the conclusions of the finder of fact, and this, it is respectfully submitted, is not an appropriate basis for this Court to exercise its certiorari jurisdiction.

A. The *Reeves* case is readily distinguishable.

The main thrust of JFH's Petition is that this Court should grant certiorari here because it did so in another employment-discrimination case, *Reeves v. Sanderson Plumbing Products, Inc.*, No. 98-60334. JFH brought the *Reeves* case to the attention of the Eleventh Circuit, without success. Even a cursory examination of *Reeves* shows why the case is of no assistance to JFH. First, *Reeves* involved an age-discrimination claim under the Age Discrimination in Employment Act, and not a disability claim under the Americans with Disabilities Act as does this case. Further, the employer in *Reeves* offered legitimate reasons for why it had fired Reeves and two other employees (one of which was quite young). Here JFH did not offer a legitimate reason for why Mr. Flynn was fired; rather, it denied that he had been fired in the first place,

and the jury did not believe this assertion. Another distinction is that in *Reeves* the plaintiff had a history of bad performance, and here Mr. Flynn had an exemplary record of employment. Another important distinction is that in *Reeves* the court held that the employer had given consistent reasons for the discharge, but noted that "proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a 'red flag' of pretext"; here JFH drastically changed its stated reasons for why (or whether) Mr. Flynn was fired, thus raising the "red flag" spoken of in *Reeves*.

B. There is no conflict between *Reeves* and the instant case.

The legal pronouncements made in *Reeves*, to the extent they can be applied to an ADA case, are perfectly consistent with the law applied by the District Court in the instant case. The District Court showed by its jury instructions and pronouncements that it understood the elements of a prima facie case to be the exact same elements that JFH is now touting as the Fifth Circuit view. So *Reeves* is of no assistance to JFH in its statement of the law. What JFH is trying to do is make a ***factual*** comparison between the instant case and *Reeves*. This comparison fails for the reasons stated above, but in any event, these factual similarities and dissimilarities are no reason for this Court to grant certiorari.

Though JFH says the instant case conflicts with *Reeves*, it does not specify what this conflict is. The unpublished *Reeves* decision makes no legal pronouncements that conflict with any rule of law applied here. This

Court's Order granting certiorari in *Reeves* does not state why certiorari is being granted, but it must be recalled that certiorari was granted in that case at the behest of the plaintiff/employee, and not upon the petition of the defendant/employer. So if there is a change in the legal concepts applying to an ADEA case as a result of *Reeves*, the change might well be negative for an employer. This Court's review in *Reeves* will likely center around the issue of whether the comments of the supervisor constituted direct evidence of prejudice that would have been sufficient by themselves to present a jury issue.

There are a number of problems with JFH's theory that the instant case somehow conflicts in spirit with *Reeves*. But even if such conflict did exist, which it does not, it is difficult to see why this Court would accept certiorari in the instant case. The *Reeves* case will serve as the vehicle for this Court to review whatever legal rules that employers such as JFH think should be reconsidered. So why does this Court need to accept certiorari here? JFH has already had the appellate review to which it has any right. There is no obligation for further review, and this Court's certiorari jurisdiction is not primarily an error-correcting procedure. Unless this Court is inclined to accept certiorari in every employment-discrimination case that comes along simply because it now has under review an employment-discrimination case, then there is no reason to accept certiorari in this case.

C. In *Reeves* there was no issue as to the sufficiency of the employer's motions for directed verdict.

Perhaps the most important distinction between *Reeves* and the instant case is that here JFH did not make proper motions at trial to preserve the issue of whether it was entitled to a judgment as a matter of law on the sufficiency of the evidence to support the verdict in favor of the Plaintiff. The District Court specifically so held, and the Eleventh Circuit affirmed this finding on appeal. *Reeves* involved no such issue. The instant case therefore has an element that was not present in *Reeves*. So if this Court were to give the Fifth Circuit's *Reeves* decision the broadest effect possible, and even if the Court were to make the sweeping pronouncements that JFH apparently hopes this Court will make in *Reeves*, the result of the instant case would not be changed. Here JFH failed to preserve the issue upon which it is now trying to convince this Court to grant certiorari.

D. There is no conflict between *Reeves* and the Eleventh Circuit's *Combs* case, and even if there were, it would not assist JFH in this case.

It appears to be JFH's position that there is some inherent, implicit conflict between the respective approaches of the Eleventh and Fifth Circuits to employment-discrimination cases. The only Eleventh Circuit case cited by JFH in support of this proposition is *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998). Yet *Combs* was not cited by the District Court in its Order, was not cited by Mr. Flynn in his Answer Brief submitted in the Eleventh Circuit,

and obviously was not cited by the Eleventh Circuit in its PCA. So how does *Combs* somehow enter into the dialogue in the instant case? It should also be noted that in *Combs* this Court denied certiorari! So obviously this Court found nothing offensive in *Combs*, even if it were somehow relevant to the instant case.

E. Certiorari is not appropriate to review factual decisions.

In the final analysis JFH is asking one more Court to overturn the jury's factual findings. In *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), Justice Frankfurter said, "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other." This is what JFH is trying to do here, and it is respectfully submitted that this is inappropriate for this Court's certiorari function.

CONCLUSION

The Respondent, THOMAS FLYNN, respectfully asks this Court to deny JFH's Petition for Certiorari for the reasons set forth above.

Respectfully submitted,

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